FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1947.

No. 450

PETER L. GUTH,
Petitioner,

vs.

THE TEXAS COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ALBERT H. FRY,
123 W. Madison Street,
Chicago, Illinois,
Attorney for Petitioner.

Midwest Law Printing Co., 340 W. Huron St., Chicago

INDEX.

Summary of Argument.

That defendant cannot destroy plaintiff's property, without consent, or without compensating plaintiff therefor, regardless of any excuses or necessities, where such property is in the sole and exclusive possession and control of defendant, where plaintiff had nothing to do with the production or destruction of the property, nor could he have, being without power or authority in the matter, and such destruction was unnecessary and solely to save money for the defendant.

Table of Cases.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1947.

No.

PETER L. GUTH,
Petitioner,

vs.

THE TEXAS COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Jurisdiction Invoked.

The decision of the United States Circuit Court of Appeals for the Seventh Circuit, dismissing the suit in affirmance of the judgment below was rendered October 11, 1947. The petition is, therefore, filed timely, and the jurisdiction of this Court is invoked under Judicial Code, Section 240 (a), 28 U. S. C. A., Section 347 (a) as amended by Act of February 13, 1925.

Opinion below.

The opinion of the Circuit Court of Appeals is unreported at this writing and is printed in the record at pages 200-201-202.

Your petitioner, Peter L. Guth, was the owner of certain portions of the oil and gas under two farms in Marion County, Illinois, described in the record as the Chapman Lease and the Schereshovech Lease, in what is known as the Salem Pool. The portions so owned were .03125 and .0382813 respectively. The defendant, under the ordinary form of oil and gas lease produced a large amount of gas and oil thereon. The object of the letting was:

> "for the sole and only purpose of mining and operating for oil and gas and of laying pipe lines, and of building tanks, power stations and structures thereon to *produce, save and take care of said products.*" (Italics ours). (R. 7-12).

The claim for oil was dismissed out of the case without prejudice. Of the gas produced, a small amount was processed and accounted for, on the basis of .035 per thousand cubic feet. The remainder, by far the larger portion was burned by the defendant without payment therefor. Based on the gas paid for, according to plaintiff's computations, the gas belonging to plaintiff, which was burned, amounted to $112,454.57, and is the subject of this action.

Defendant's answer denied generally, all allegations of the complaint; set forth the troubles and competition met and insisted that the sole liability of defendant was under the "3rd" paragraph of the leases, which called for payment for gas:

> "produced from any oil well and used off the premises or in the manufacture of gasoline or any other product a royalty of one-eighth (1/8) of the market value at the mouth of the well."

(No mention was made in the lease of gas burned or to be burned); that it had no market for the gas at the time and had no facilities for caring for it, hence, as a matter of safety it was burned and that by reason thereof defendant is not liable therefor.

Three appeals were had in the case, two on the pleadings and a third on the merits. On the second appeal (155 Fed. (2) 563-566) the Circuit Court of Appeals said:

> "It makes no difference who wasted the gas, gasoline and petroleum distillates. If the defendant produced and had in its possession, oil and gas, it became the owner of such oil and gas, and it owed the lessors their royalty therefor."

On the third appeal, on the merits, the same court said:

> "We cannot agree that this was such possession as would make the defendant liable."

and affirmed the order dismissing the case.

Salient Facts.

The salient facts are: Under the leases in question, the defendant was in exclusive possession and control of the premises, insofar as necessary to the production of oil and gas. The plaintiff had not, nor could he have any control, authority, or power, or other action that might look to the saving of his oil and gas under the premises. In the course of production the oil and gas entered the pipes of the defendant, whence it was conducted to defendant's "separator", a huge drum in which the gas was separated from the oil, under pressure.

The gas so separated, entered the "flare pipe" of defendant and was burned, except such of it as the defendant chose to process. Thus, through the entire process or period, from production to destruction, it was in the exclusive possession of the defendant.

There was an unlimited market for the product as commercial gasoline, if the defendant had prepared it for market, which the defendant refused to do, on the alleged ground that it would be uneconomic to build a processing plant large enough to process it, therefore the plaintiff must stand the loss, was their claim and reasoning. A witness for defendant, uncontradicted, admitted that it could have been processed or put back into the formation. A statute of the state commanded that gas so produced *and not utilized* must be destroyed. As stated, the defendant processed some 798 million cubic feet and burned the remainder. No reason was given for not putting it back into the formation.

No reason was assigned by either court why the plaintiff should be charged with the loss of his property, where he had never consented to its destruction and had absolutely nothing to do with either, its production, the manner of handling it, or its destruction, committed by the defendant as soon as it came into its possession, nor was any reason assigned why the defendant was excused from putting it back into the formation and saving it to be marketed later. Nor was any reason assigned why the cost or value of the gas should not be paid and charged as a part of the cost of production, in accordance with all accepted theories of auditing.

Specification of errors intended to be urged.

1. In holding that the defendant could burn and destroy plaintiff's property without compensating the

plaintiff, where plaintiff had no power or connection with such destruction, never consented to such destruction, nor did the lease grant such or any similar power to the defendant.

2. In not holding that the defendant was a trustee insofar as the property of the plaintiff was concerned and to the extent of the value of such property of the plaintiff, which came into the hands of the defendant, and that defendant should account to the plaintiff for such property, where such property was in the exclusive possession of the defendant at the time of its destruction by the defendant, where plaintiff was without any power or authority in the matter at the time of its destruction by defendant.

3. In not holding that the defendant, as trustee, was accountable for the property of the plaintiff which was in the exclusive possession, control and disposition of the defendant, and which was burned and destroyed by the defendant, while in such possession of defendant.

4. In not holding that gas is an additional and very valuable product for which defendant is liable, and for which owner must be paid.

5. In not holding that defendant must pay for all products coming into its hands, otherwise it would get a very valuable product without paying anything therefor.

6. In not holding that the defendant agreed to produce all the oil and gas under the premises in order that the plaintiff could realize on the value of those products, and since the defendant destroyed a great portion thereof, it is liable to the plaintiff for the value thereof.

7. In not holding that, even if it were necessary to burn the property (which was not the case, it could

have been put back into the formation and saved), the plaintiff must be compensated therefor and the cost charged to the product as a cost of production, where such property was in the sole and exclusive possession and under the exclusive control of the defendant, with no power of protection in the plaintiff, where it was intentionally destroyed and burned by the defendant.

8. In adopting the reasoning of the defendant, to the effect, that if the defendant cannot economically process, or take care of the gas, the owner of the raw material must stand the loss, notwithstanding that the owner had no power or authority in the matter, had never consented to the destruction or had any connection therewith, and the lease contained no such provision, authority, limitation or condition, and the defendant had destroyed the property intentionally.

9. In not holding that where the lease in question specifically provided that the defendant "produce, save and take care of said products" (referring to oil and gas), that the defendant had no authority thereunder to do otherwise and must therefore account to plaintiff for any gas belonging to plaintiff, intentionally burned and destroyed.

10. In not holding that the producer, expert in that line, when it took the lease, took with it the chance involved, in the production and caring for the property which came into its hands belonging to the plaintiff, as promised in the lease under which it operated, nor would the court, under such circumstances have the power or authority under such lease, to saddle the loss on and charge it to the owner, where such owner had nothing to do with it, never consented to the destruction and had no power or authority in the premises.

Holdings of courts in leases of this character.

Ohio Oil Co. v. *Indiana,* 177 U. S. 190-204:

"If the use he makes of his own, or its waste, is injurious to the property or health of others, such use may be restrained or damages recovered therefor." (Defense set up identical with the defense in case under consideration).

State of Indiana v. *Ohio Oil Co.,* 150 Ind. 21-45:

"But even if he cannot draw oil from such wells without wasting gas, and is forbidden by injunction to do so, it is only applying the doctrine that the owner must so use his property as not to injure others."

Poe v. *Humble Oil Co.,* 288 S. W. 264-265:

"The same duty rests upon the appellee to protect from waste in the air or upon the ground, which rests upon it to protect from underground drainage."

Gilbreath v. *States Oil Co.,* 4 Fed. (2) 232-235.

"It (casinghead gas) forms a most important element in petroleum oil, and, as such, the lessee would be required to pay therefor, otherwise he would be receiving a very valuable product without giving anything in return therefor."

Wemple v. *Producers Oil Co.,* 145 La. 1031-1045:

"We find nothing in the record to impair the doctrine that no one is presumed to give, and hence nothing to warrant the belief that it was within the contemplation of the contract between the plaintiff and the defendant that the defendant should be allowed to take more than $20,000 worth of gasoline (valued at about half the market price) from plaintiff's land within a period of less than ten months, and give nothing in return."

Mathes v. *Shaw Oil Co.,* 101 Pac. 998:

"The lessor should have of right what oil and gas his premises will produce."

Pritchard v. *Freeland Oil Co.*, 80 W. Va. 787-789:

"The lessor should of right have what oil and gas his premises produce, whether it be taken from one well or several."

Carroll Gas & Oil Co. v. *Skaggs*, 231 Ky. 284-291:

"But in this case the proof is sufficient to show that gas had been taken from the land which was gone forever, and to that extent of the value of the royalty the lessors were damaged."

Daughetee v. *Ohio Oil Co.*, 263 Ill. 518-527:

"The point is that the defendant agreed to do this in order that the lessor could realize on the value of these products."

Ludley v. *Pure Oil Co.*, 11 Pac. (2) 102:

(Involving casinghead gas produced with oil):

"There is a trust of fiduciary relation between the parties * * * A tenant in common receiving the common property, either wrongfully or by consent, *holds it as trustee for his co-tenant to the extent of the interest of the co-tenant who may compel an accounting.*" (Italics ours).

Jennings v. *Southern Carbon Co.*, 80 S. E. (W. Va.) 368-370:

"To allow him to direct developments in the manner only to the promotion of his gain and effectually to the impoverishment of the lessor's estate in the oil and gas cannot in reason be deemed even remotely contemplated by either party at the inception of the lease."

Silver King Coalition Mines Co. v. *Conkling Min. Co.*, 255 Fed. 740-743. (Certiorari denied, 242 U. S. 629).

(Speaking of doubt of amount of damages): "the doubt should have been and should now be so resolved, in accordance with the basic principle of the accounting of a negligent or reckless trustee or agent,

that the latter shall receive no profit from his wrongful treatment of the property of his *cestui que* trust, and the latter shall receive the just value of its property and its income."

Reasons for granting the writ.

1. The decision of the Circuit Court of Appeals in this case is contradictory of the decision of the Supreme Court of the United States in *Ohio Oil Co.* v. *Indiana,* 177 U. S. 190, wherein the court holds that if the producer destroys the property of others, damages may be recovered therefor. The defense in that case was identical with the defense in this case.

2. The decision of the Circuit Court of Appeals in this case is directly contradictory of the Supreme Court of the United States in *Story Parchment Co.* v. *Patterson Parchment Paper Co.,* 282 U. S. 555-563-565, wherein that court holds that a trustee must account for all property of the *cestui que* trust, coming into its hands.

3. The decision of the Circuit Court of Appeals in this case is directly contradictory of its own decision in a former appeal, 155 Fed. (2) 563-566, wherein it held that "If the defendant produced and had in its possession, oil and gas, it became the owner of such gas, and it owed the lessors their royalty therefor." The possession was in the pipes and separator of the defendant, under defendant's exclusive control, from whence it was conducted by the defendant in its pipes and burned by the defendant.

4. The decision of the Circuit Court of Appeals in this case is directly contradictory of the decision of the Circuit Court of Appeals in *Humphreys Oil Co.* v. *Tatum,* 26 Fed. (2) 882-884, in that it specifically allows the

defendant to impair the lease, by destruction of the propulsive force, the gas, whereas the federal court in the above case decided that "there would certainly be an implied covenant that the lessee do nothing to impair the value of the lease to the lessor," referring to oil and gas lease such as involved herein.

5. The decision of the Circuit Court of Appeals in this case is directly contradictory of the decision of the Circuit Court of Appeals in *Gilbreath* v. *States Oil Co.*, 4 Fed. (2) 232-235, wherein the court holds that the producer would be receiving a very valuable product without giving anything in return therefor, and would not allow it.

6. The decision of the Circuit Court of Appeals in this case is directly contradictory of all decisions of all the courts which hold that the owner of property must be compensated for the loss of his property, destroyed by another without his consent.

7. The decision of the Circuit Court of Appeals in this case is directly contradictory of the decision of the Supreme Court of Illinois in *Daughetee* v. *Ohio Oil Co.*, 263 Ill. 518-527, wherein that court, in establishing a rule of property decided that the producer must produce the gas in order that the owner can realize on the value of this product.

8. The decision of the Circuit Court of Appeals in this case is directly contradictory of the decision of the Circuit Court of Appeals in *Gilbreath* v. *States Oil Co.*, 4 Fed (2) 232, wherein that court holds that where property is destroyed the owner must be compensated.

9. Under our constitution the Government of the United States cannot destroy property "without just compensation". The decision of the Circuit Court of

Appeals in this case gives a private corporation greater power in that respect than the federal government possesses, which was never intended by our lawmakers or our courts.

10. A very important question of law is involved in this suit, *viz.*: Can the oil producer destroy the property of another without payment therefor, regardless of the reason for, or the excuse for such destruction, where the owner had no voice or power and was not consulted about it.

11. The decision of the Circuit Court of Appeals in this case has so far departed from the accepted and usual course of judicial proceedings and has sanctioned such a departure in the lower court from the accepted law of this country, particularly the law of damages, as to call for the exercise of this court's power of supervision.

12. The decision of the Circuit Court of Appeals in this case is directly contradictory of the decision of the Supreme Court in *Ludey* v. *Pure Oil Co.*, 11 Pac. (2) 102, wherein that court holds that the producer is a trustee for his co-tenant to the extent of the interest of his co-tenant of such property and must account for it to his co-tenant.

13. By the decision of the Circuit Court of Appeals in this case, the plaintiff is deprived of property valued at $112,454.57 without any compensation of any kind therefor. The defendant had exclusive possession, with exclusive control, the plaintiff had no power or authority in the matter and never consented to the destruction. If such can be done, in complete negation of the law of damages as universally understood, the question of law is so very important that this court should finally enunci-

ate the principle, if such is the principle of law accepted by our courts.

Wherefore, your petitioner, Peter L. Guth, plaintiff below, respectfully asks that the prayer for a writ of *certiorari* to the United States Circuit Court of Appeals for the Seventh Circuit be granted and that this Court proceed as provided by law and the rules of this Court in such cases, and upon a final hearing the judgment of the United States Circuit Court of Appeals for the Seventh Circuit be reversed, with directions to reverse the judgment below and enter a decree in favor of the plaintiff for the sum so due your petitioner herein.

Respectfully submitted,

PETER L. GUTH,

ALBERT H. FRY,
His Attorney.
123 West Madison Street,
Chicago, Illinois.

AUTHORITIES.

I.

Where property is destroyed the owner must be compensated.

Ohio Oil Co. v. *Indiana,* 177 U. S. 190.

Wemple v. *Producers Oil Co.,* 145 La. 1031.

Mathes v. *Shaw Oil Co.,* 101 Pac. 998.

and many other cases.

II.

Lessee is a trustee to the extent of the interest of the cotenant which he holds, whether wrongfully, or by consent.

Ludey v. *Pure Oil Co.,* 11 Pac. (2) 102-104.

Rice v. *Peters,* 128 App. Div. (N. Y.) 776-778.

Merrit Oil Co. v. *Young,* 43 Fed. (2) 27-31.

and other cases.

III.

Trustee is responsible for the property of the trust.

Silver King Coalition Mines Co. v. *Conkling Min. Co.,* 255 Fed. 740.

Dixmoor Golf Club v. *Evans,* 325 Ill. 612-625.

Story Parchment Co. v. *Patterson Parchment Paper Co.,* 282 U. S. 555.

IV.

Trustee must account for trust property; it is not necessary for the cestui que trust to show that there is anything due; trustee must affirmatively prove its innocence and care. All doubts are resolved in favor of cestui que trust.

Biddle Purchasing Co. v. *Snyder,* 96 N. Y. S. 356.

Knowlton v. *Fourth-Atlantic Bank,* 271 Mass. 343-350.

Axel E. Johnson v. *Kansas Natural Gas Co.,* 90 Kan. 565-580.

and other cases.

V.

Plaintiff was the owner of his proportionate share of the gas and oil under the premises.

Jilek v. *Chicago, Wilmington & Franklin Coal Co.,* 282 Ill. 241-248.

VI.

The lessee agreed to produce all the oil and gas under the premises, in order that the owner could realize on the value of those products.

Daughetee v. *Ohio Oil Co.,* 263 Ill. 518-527.

VII.

There is an implied covenant to produce, save, and market the gas at market value.

Pritchard v. *Freeland Oil Co.,* 80 W. Va. 787-789.

George v. *Curtain*, 108 Okla. 281-282.

Peoples Gas Co. v. *Dean*, 193 Fed. 938-944.

and other cases.

VIII.

Lessee must pay for all products, else he would get something for nothing.

Wemple v. *Producers Oil Co.*, 145 La. 1031-1045.

Gilbreath v. *States Oil Co.*, 4 Fed. (2) 232-235.

Carroll Gas & Oil Co. v. *Skaggs*, 231 Ky. 284-291.

and other cases.

IX.

Damages may be recovered for the destruction of gas.

Ohio Oil Co. v. *Indiana*, 177 U. S. 190-204.

X.

Tenant in common taking oil or gas—a part of the freehold, must account.

Silver King Coalition Mines Co. v. *Conkling Min. Co.*, 255 Fed. 740-743.

Bogert on Trusts, Vol. 3, Sec. 582.

XI.

Failure to find a market, no defense.

Pritchard v. *Freeland Oil Co.*, 80 W. Va. 787-790.

XII.

The defendant must account for all the gas belonging to the plaintiff, which has come into its possession, by paying him his royalty therefor.

Guth v. *Texas Co.,* 155 Fed. (2) 563-566.

Gilbreath v. *States Oil Co.,* 4 Fed. (2) 232-235.

Benedum-Trees Oil Co. v. *Davis,* 107 Fed. (2) 981, 985.

and many other cases.

XIII.

Payment to plaintiff for gas processed, established a value for all the gas produced.

XIV.

Where one saves money at the risk of injuring others, it brings liability with it.

Welsh v. *Kerr,* 233 Pa. 341-344.

Jennings v. *Southern Carbon Co.,* 80 S. E. 368-370.

Ohio Oil Co. v. *Indiana,* 177 U. S. 190.

XV.

Gas recovered with oil is an additional product, for which the owner should be paid.

Gilbreath v. *States Oil Co.,* 4 Fed. (2) 232-235.

Twin Hills Gasoline Co. v. *Bradford Oil Corp.,* 264 Fed. 440-441.

Wemple v. *Producers Oil Co.,* 145 La. 1031-1045.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1947.

No.

PETER L. GUTH,
Petitioner,

vs.

THE TEXAS COMPANY,
Respondent.

BRIEF

As stated, the plaintiff was the owner of a proportionate share of the gas, gasoline and oil, under two farms in Marion County, Illinois. The defendant, under the ordinary form of oil and gas leases operated on the farms and produced a large amount of oil and gas. The oil was dismissed out of the case without prejudice. Of the gas, a small portion was processed by the defendant and accounted for, leaving as the issue in this case, the remainder of the gas which was produced and burned, without payment therefor. Under the leases the defend-

ant was in exclusive possession and control of the farms insofar as necessary in the production of oil and gas, and the plaintiff had no power or authority whatsoever.

When the wells were drilled and oil found, it entered the pipes of the defendant, whence it was conducted to the "separator" of the defendant—a huge drum employed to separate the gas from the oil. The oil was conducted to "tank batteries" for storage and shipment. About 2% of the gas was processed by the defendant, for which plaintiff was paid for his share, an average of .035 per thousand cubic feet. The remainder was conducted through "flare pipes" and burned, without payment therefor. Those flares continued twenty-four hours per day, to a height of fifty and sixty feet. A fifty foot flare consumed about 1,424,000 cubic feet per day and a sixty foot flare consumed approximately 1,693,000 cubic feet per day—a large amount in the aggregate, in other words, $59.25 per day, from each well.

The court says: "One cannot be said to possess something which he cannot by force of circumstances contain or control." The defendant did contain it in their separator and they also controlled it in that separator and in the pipes, otherwise there would have been catastrophe. The defendant never so much as suggested that they could not control it, nor that they could not contain it. The defense was that it could not economically process it and had no place where it could be stored, precisely what the Ohio Oil Co. claimed in the case cited. The statement is untrue, because it could have put it back into the formation. The court apparently never considered that part of defendant's duty, at least, there is no reason given in the opinion why the defendant should not have put it back into the formation and saved it, which, with the very shallow formation and the very

low pressure, could have been done at very low expense. It is difficult for us to understand why the defendant was not in possession of that gas from any angle. Just what sort of possession the Circuit Court of Appeals had in mind, we cannot understand, since the defendant had absolute and exclusive control of the gas within its own separator.

Defendant's expert witness testified that it could have been processed, or it could have been put back into the formation, which would produce new energy and more oil. (R. 163). Defendant insisted that there was no market, but in each instance qualified the statement by adding "in its raw state". He testified further that The Sunflower Co. bought casinghead gas (the gas here involved) and paid for it. Another witness, the defendant's superintendent, testified that The Sunflower Co. and the Warrenton Petroleum Co., were extracting liquid hydrocarbons from casinghead gas, such as here involved, from the same pool (R. 102).

The issue in the case seems simple and narrow. The plaintiff's contention is, that the defendant cannot destroy plaintiff's property, without the consent of plaintiff, which was never obtained in this matter, without compensating plaintiff, regardless of any excuses or necessities, where such property is in the sole and exclusive possession and control of the defendant, and plaintiff had nothing to do with the destruction, nor could he have. Plaintiff's answer to defendant's contention is, that if defendant could not economically process the gas, some other producer might, and defendant should have withdrawn from the farms and given up the leases, if it did not want to take the burdens with the profits.

Defendant's contention is, that where it may be uneconomic, or expensive to process the gas so produced,

and a state statute commands destruction of all gas *not utilized,* the defendant may destroy such property, rather than process it or put it back into the formation, and under such circumstances it will not be liable to the plaintiff. In other words, to avoid a loss on its part, it can charge the loss to the owner of the raw material, who has no power or authority in the matter and has never been consulted. The Circuit Court of Appeals upholds the latter contention. If this position is maintained, it will be an absolute negation of the law of damages, and the plaintiff will be robbed of his property valued at $112,454.57, with complete sanction of the courts.

Boiled down and stripped of all adjectives, the contentions set forth in the two preceding paragraphs, are the contentions of the parties in this case. The defendant paid the plaintiff .035 per thousand cubic feet for his portion of the gas processed, about 2% of the gas produced. It charges the loss of the other approximate 98% to the owner, who had no authority, possession, power or voice in the unnecessary destruction of his property by another. The gas was in a safe place, the defendant, in the course of production, caused it to become unsafe, by bringing it to the surface and refused to either process it or put it back into the formation where it would be absolutely safe, in order to save money for the defendant, at the expense of the plaintiff who had nothing to do with it, nor could he.

If the defendant can refuse to utilize the gas produced and burn it to save the expense of preparation to market, it can likewise destroy such of the oil as it does not care to prepare for market, and thus render the contract a *nudum pactum* insofar as the defendant is concerned, at the expense of the owner. It seems that both parties

should be held equally bound. The Circuit Court of Appeals, in effect, held the contrary.

To avoid loss and liability, four courses were open to the defendant:

1. It could process the gas, pay the plaintiff his royalty and put the residue back into the formation to be marketed in the future.

2. It could put all the gas not processed back into the formation.

3. It could pay the plaintiff his royalty on the gas produced, as decided by the Circuit Court of Appeals in the second appeal, and charge the cost to the product as a cost of production, in accordance with accepted rules of auditing, if it was in fact necessary to burn it (which it was not).

4. It could, under the decision of the Supreme Court in *Ohio Oil Co.* v. *Indiana,* 177 U. S. 190, obtain an injunction against competitors against waste, which would allow the defendant to produce in a manner to enable it to utilize all products, including gas.

The defendant repeatedly insisted that the gas was worthless in its raw state. If we accept that basis of valuation, iron is worthless before mining; the tree before it is cut down and in lengths; the grain in the field prior to reaping and threshing. Every raw material is worthless in its raw state, until we prepare it by reducing it to such condition as would enable us to market it. Such a valuation would have to be arbitrary and would never be accepted by its owner, and should not be. It is worth the market, less the cost of production according to all accepted theories of auditing.

In the court below the defendant took the position that it was liable only for such property as was specifically mentioned in the lease and covered therein, leaving it, inferentially, at liberty to destroy any and all other property coming into its hands, without liability. The Circuit Court of Appeals sanctioned such construction.

The Circuit Court of Appeals, in its opinion says: "The plaintiff is the owner of one thirty-second of the royalty *which the defendant agreed to pay for oil and gas to be taken from certain lands,* pursuant to leases thereon" (Italics ours). The plaintiff is only asking that the defendant do that very thing. But the defendant has burned about 98% of the gas taken from those lands and refused to pay the royalty. And the Circuit Court upholds that refusal to pay, *contrary to the contract, as construed by the court.* The court discusses the question whether it would be profitable or not, for the defendant to do certain things, *not mentioned in the lease,* and excuses payment based thereon. If defendant's profits determine the question of liability of defendant for the intentional destruction of plaintiff's property, which was unnecessary, then, while we may have law, we have no justice.

The time at which the processing plant was erected has nothing to do with the matter. That plant was in operation within two months, and the flares continued for years afterward. During the two months only an inconsequential amount of gas was burned. The defendant tried to create the impression that only that gas was being sued for, which was not true. The Circuit Court of Appeals, after admitting that the gas was in the defendant's pipes and in its separators, goes on to say: "We cannot agree that this was such possession as would make the defendant liable. One cannot be said to possess

something which he cannot by force of circumstances contain or control." In the first place, the defendant never claimed that it could not contain or control it, because such a claim would have been silly, when the defendant had it contained and controlled at all times, to prevent a catastrophe. We confess that we are at a loss to understand the meaning of the Circuit Court of Appeals in that statement. Did it mean that the defendant must have it in some special sort of container, other than their separator and pipes? As we understand the word from the dictionary, possession means "the having, holding or detention of property." The defendant certainly had it, held it and detained it, otherwise the safety department of the State would have been interested. The court says nothing about the fact that the defendant could have put it back into the formation. But assuming that the defendant did not have the gas in some special container, not designated by the court, is that a reason for charging the plaintiff, who owned the property, who had no voice or connection with the unnecessary destruction with the loss? That is the only reason advanced by the Circuit Court of Appeals for so charging the loss, aside from the ground that the defendant could make no profit on processing, if the Court's guess is right on that question. With highest respect for that court, we must insist that the position is not tenable, consistent with justice, or the sacred right of ownership of property. The constitution prohibits the government "destruction of property without just compensation". The Circuit Court of Appeals gives this private corporation a greater right than the government has.

With reference to putting the gas back into the formation, the KMA pool in Texas returns gas at the rate of 9,500,000 cubic feet per day; Villa Platte in Louisiana,

100,000,000 cubic feet per day; Cotton Valley in Louisiana, 150,000,000 cubic feet per day; Tepetate in Louisiana has returned 32,000,000,000 cubic feet; Cook Ranch pool in Texas, 21,305,244,000 cubic feet produced from the pool and 7,916,097,000 cubic feet purchased outside. Not a cubic foot of gas was burned by any of the above to get rid of it. Salem field, here involved, is from 1800 to 3500 feet in depth, with a pressure of 360 to 466 pounds. Tepetate field has a depth of 8254 feet and a pressure of 3640 pounds; Paloma field in California, 11,000 feet and a pressure of 2200 to 3000 pounds; Gloria field in Texas, 7560 feet, 2800 pounds and returns 225,000,000 cubic feet daily, and as stated, every foot is returned to those formations. It is to be remarked, that it is far more expensive to return gas to the very great depths, and exceedingly high pressures, than it would be to the shallow formation with the low pressures in Salem pool, consequently, the statement of defendant that it had no way of storing it, should be rejected.

Defendant's statement that the gas was worthless in its raw state, should likewise be disregarded. It paid .035 per thousand cubic feet for the same gas in its raw state from the same pipes, and the lease provides for the payment of "a royalty of one-eighth of the market value at the mouth of the well", which is likewise in its raw state. The Circuit Court of Appeals did not go into the question of value of the property at all, notwithstanding that the plaintiff showed it to be worth $112,454.57.

The Circuit Court of Appeals, in its opinion, adopts the reasoning of the defendant, to the effect, that if the defendant cannot economically process or take care of the gas, the owner of the raw material must stand the loss, notwithstanding that the lease contains no such

provision, limitation, or condition, and no consent to the destruction is shown, where plaintiff has no power, authority or control thereof, in fact has no connection whatever with the production or destruction of his property involved, valued at $112,454.57. If such is the case, with due respect for the Circuit Court of Appeals, there is not much left of the law of damages, as heretofore promulgated.

It would seem that the producer, expert in that line, when it took the leases, would take with it the chances, as was held in *Palmer* v. *Truby,* 136 Pa. 556-564, where the court said: "As before observed, it was a speculation pure and simple, in which the lessee took all the risk. They did so for the chance of getting seven-eighths of the oil.", in the production, saving and caring for the property, as promised in the provision of the lease to "produce, save and take care of said products." Burning the gas at the expense of the owner, is not "taking care of it." Nor should that be charged to the owner who had nothing to do with it, nor could he. Nor would that seem to give the court authority to saddle the owner with the loss that might occur to the defendant under the contract, unless we completely disregard the dictates of justice, and all the decisions heretofore rendered by the courts under similar circumstances. The court, in *Stanolind Oil & Gas Co.* v. *Kimmel,* 68 Fed. (2) 520, held squarely to the contrary and in line with the *Palmer* case decision, quoted above.

To approach the question from another angle, which we consider as the true and logical angle, property belonging to the plaintiff came into the hands and under the exclusive control of the defendant. It is impossible to call that anything other than a trust. As such trustee the defendant must account to the owner for property

coming into its hands and under its control. If we suppose that, instead of the gas, $112,454.57 in paper money, belonging to the plaintiff came into the hands of the defendant, with power of disposition and control, it would be inane to say that the defendant could burn it, because, it would be uneconomical to build a vault to care for it, yet the principle involved is identical with that involved here.

Approach the facts in the case and the decision of the Circuit Court of Appeals thereon, from any angle or point of view, and the plaintiff loses property of the value of $112,454.57, by reason of the intentional and unnecessary destruction of it on the part of another, who has exclusive and absolute control thereof, with no power, authority, or connection therewith by the owner, solely to save money for the other, contrary to the positive provisions of the leases, a concept which is totally foreign to our processes of justice and our laws covering the question of damages.

CONCLUSION.

We respectfully insist that, where property is burned by another, without consent of the owner, and where the owner has not and cannot have any connection with such property, or its destruction, and has no authority or power of control of such property, which is in the possession of another, such owner must be compensated under our law, and no excuse or necessity of such destroyer can deprive such owner of his right of compensation. No decision of any court in this country, other

than the decision in this case, can be found holding contrary to our statement of such right as set forth above.

The defendant has no legal defense. When they burned this gas, they relied on the ignorance of the plaintiff regarding his rights and his inability to prove the measure of damages, to protect them from loss, by reason of the fact that all the evidence is in the possession of the defendant, and is not obtainable otherwise, or from any other source. It does not exist otherwise. The defendant gambled that no lawyer could, or would unearth that evidence.

And, as a consequence, we respectfully pray, that a writ of *certiorari* be granted, and that this Court proceed as provided by law and the rules of this Court in such cases, and upon final hearing the judgment of the United States Circuit Court of Appeals for the Seventh Circuit be reversed, with directions to that court to reverse the judgment below, with directions to that court to enter a decree in favor of the plaintiff for the sum so due your petitioner herein.

PETER L. GUTH,

By ALBERT H. FRY,
His Attorney,
123 West Madison St.,
Chicago, Illinois.